No. 78-960

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES B. COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the district court failed to comply with Fed. R. Crim. P. 11(c)(1) in accepting his plea of nolo contendere.[1]

1. On October 18, 1977, in the United States District Court for the District of New Mexico, petitioner pleaded nolo contendere to an information charging him with mail fraud, in violation of 18 U.S.C. 1341. Before accepting the plea, the district court explained to petitioner that the

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[1]The Rule provides:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

information charged him with devising a "scheme to get some money from the First National Bank by false pretenses" (Tr. 3). The court stated that the information alleged that petitioner drew checks on an account at a bank in Amarillo, Texas, deposited those checks in the First National Bank in Albuquerque, New Mexico, and then drew checks on the Albuquerque account, knowing that there were insufficient funds in that account to cover the checks (Tr. 3-4). The court also advised petitioner that he could be sentenced to five years' imprisonment and a fine of $1,000 (Tr. 5). Petitioner said that no promises had been made to him in exchange for his plea (Tr. 9), and he told the court that he knew he was breaking the law by putting bad checks in the Albuquerque bank account and then drawing on that account to cover business expenses (Tr. 10-11). On November 21, 1977, petitioner was sentenced to 18 months' imprisonment (Tr. 21).

On December 22, 1977, after the expiration of the time during which he could have taken a direct appeal, petitioner moved to withdraw his plea under Fed. R. Crim. P. 32(d). At the hearing on the motion, the attorney who represented petitioner when he entered his plea testified that he had explained to petitioner that intent to cheat and defraud the bank was an element of the mail fraud offense (Tr. 40). The district court denied petitioner's motion to withdraw his plea (Tr. 101), finding that petitioner, a college graduate and an experienced businessman, had been adequately informed of the elements of the offense and that he "fully understood what he was charged with" (Tr. 103-104). The court of appeals affirmed (Pet. App. i-vi).

2. The necessary scope of the examination required by Rule 11(c) "may vary from case to case depending on the complexity of the action and the individual defendant." 8 *Moore's Federal Practice* para. 11.02[1] at 11-23 (2d ed. 1978). See *McCarthy* v. *United States*, 394 U.S. 459, 467 n.20 (1969); *Sappington* v. *United States*, 523 F. 2d 858 (8th Cir. 1975).[2] Here, the charge against petitioner was straightforward and his intelligence, education, and experience indisputably enabled him to understand it. Both the district court and defense counsel informed petitioner that the mail fraud offense involved a scheme to obtain money from the bank by depositing bad checks and then drawing on the nonexistent funds that the checks represented. Petitioner admitted that he knew his acts were criminal. These circumstances indicate that petitioner had the requisite intent and that he understood the charge against him. See *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976). Hence, the courts below correctly concluded that petitioner had not demonstrated the "manifest injustice" that would entitle him to withdraw his plea under Rule 32(d).[3]

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[2]Petitioner suggests (Pet. 7) that the court of appeals erred in relying on *Sappington* because that case was decided prior to the effective date of the 1975 amendment of Rule 11(c). The current Rule 11(c)(1) requires the district court to inform the defendant of the nature of the charge to which a plea of guilty or nolo contendere is offered and to determine that the defendant understands the charge. The earlier version of Rule 11 required the district court to determine that "the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Under this version of the Rule, the court often, if not always, needed to explain the charge to the defendant in order to ascertain that he understood it. In any event, even if there is some small difference in this regard between the present and past versions of Rule 11, *Sappington* remains apposite. The case held that the scope of the examination required by Rule 11 may vary with the complexity of the charge and the surrounding circumstances. The Advisory Committee's Notes to the 1975 amendment state that that approach is equally applicable under the current version of the Rule. 62 F.R.D. 271, 278-279 (1974).

[3]Petitioner also contends (Pet. 11) that Rule 11 requires the district court to satisfy itself that there is a factual basis for a plea of nolo contendere. As the court of appeals correctly noted (Pet. App. iv), however, Rule 11(f) imposes such a requirement only in connection with pleas of guilty, not pleas of nolo contendere.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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